National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: March 20, 1998

TO: James J. McDermott, Regional Director, Region 31

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: ABC, Inc.; Academy of Motion Picture Arts and Sciences, Case 31-CA-23203; ABC, Inc., Case 31-CA-23204

524-5056-7800. 524-5056-7850. 530-8090-0133

These cases were submitted for advice as to whether the charged Employers violated the Act when, in an effort to avoid threatened disruption of the broadcasts of the Academy Awards and related local programs by the Union in furtherance of its dispute with ABC, the Employers removed production work away from the Union.

FACTS

Background

The most recent collective-bargaining agreement between NABET (the Union) and ABC expired on March 31, 1997. Article VII, "Program Origination," of that contract defined unit work as follows:

...an Engineering employee or Engineering employees, as required shall be present at the origin of Company television programs originating within the Continental United States (excluding Alaska).

. . ."Company television program(s)". . .shall include only program material or portions of programs (i.e., inserts or segments of any length) or entire programs, which in any case are broadcast by the Company and are either produced by the Company, or produced by others for the Company when the Company owns the basic underlying property rights in such program material, or portions of programs, or entire programs and subcontracts the production of the program to others.

The parties are still negotiating over a new agreement. ABC has continued to honor the terms and conditions of the expired agreement, but for the Union security clause and the contractual grievance-arbitration system.

During the summer of 1997, NABET Local 16 in New York started to issue grievance strike notices to ABC concerning unresolved grievances. These strike notices were threats to engage in 24-hour strikes against ABC in situations where ABC was covering live events such as sporting events. In one instance, in the fall of 1997, ABC was prevented form telecasting a live golf match and had to replace that program with videotape of a prior golf match. No other one-day strikes were held because the parties either reached agreement on the underlying grievance or the Union decided not to strike the event., Case 31-CA-23203, involving the Academy Awards Presentation

ABC has produced and broadcast the annual Academy Awards program (the Presentation) for the Academy of Motion Picture Arts and Sciences (the Academy) for many years.[(1)] The most recent agreement, effective since April 20, 1993, contained the following provision:

1. Programs: Subject to the terms and conditions hereinafter set forth, the Academy hereby grants to ABC the exclusive right to produce television programs (the "Program(s)") consisting of coverage of the Annual Academy Award Presentations. . .for the years 1994, 1995, 1996, 1997, 1998, 1999, and 2000; and to broadcast such Programs, each on a one-time-only live basis, within the United States and its territories and possessions ("Domestic Broadcast Area"). Each Presentation will be presented on the stage of a theater chosen by the Academy, and shall be generally comparable to the 64th Annual Academy Award

Presentation presented in 1992 as to categories, method of selection of award winners, and appearances of presenters and award winners. Subject to the preceding sentence, the Academy shall have sole and exclusive control of the creation and production of the Presentations, and of their presentment to the audience in the theater, including, but not limited to, the lighting of the theater, and the lighting of the exterior of the theater.

The Academy President saw the ABC golf tournament broadcast that was disrupted by the Union's brief strike. Concerned that the Presentation broadcast scheduled for March 23, 1998,[(2)] might be similarly disrupted, the Academy asked ABC for assurances to the contrary. ABC replied that it could not provide such assurances in light of its unresolved disputes with the Union. On January 16, the Academy and ABC executed a new agreement to modify the contract described above concerning the Presentation. Section 1, "Production Obligations," states:

The Academy will assume from ABC all obligations and responsibilities for producing a network quality and distribution-ready program capable of being broadcast by ABC upon receipt at ABC facilities external to the theater in which the presentations take place (commonly known as a "line feed" from the Academy production truck). The Academy specifically assumes all of the production obligations and responsibilities previously assigned to ABC in the contract and shall cause the program to be delivered to ABC for its broadcast.

Section 3, "Production Decisions," states,

The Academy will have the sole right to make all production decisions, including personnel and labor relations decisions, previously allocated in whole or in part to ABC. . . ABC shall have reasonable creative consultation rights with respect to the production of the programs.[(3)]

The new agreement also modified the financial provisions of the prior contract.

The Academy has since hired personnel to perform the production work previously performed by ABC. IATSE presented authorization cards and asked the Academy for recognition. The cards were examined and verified by a neutral labor arbitrator. On February 16, the Academy recognized IATSE as the collective-bargaining representative of the Academy production employees. On February 20, the Academy and IATSE entered into a collective-bargaining agreement covering a unit of technical employees involved in the production of the Presentations.[(4)] The contract is effective from February 16, 1998 through June 1, 2000.

When the Union learned of the new agreement between the Academy and ABC, the Union sent letters to the Academy referring to the Union's dispute with ABC and threatening that the broadcast of the Presentation could be disrupted. A January 23 letter stated,

. . .the Academy has not achieved any kind of protection from disruption, as our members may choose to engage in a strike against ABC at any time, including during the Oscar telecast. If the Academy truly wishes to ensure that a labor dispute will not affect the telecast, it should talk to ABC about reaching an agreement with us.

A February 18 letter stated:

Please be forewarned that NABET-CWA is planning to engage in concerted activity in both California and New York to preserve its traditional jurisdiction on the Disney/ABC broadcasts, and to safeguard its right to engage in protected activities under the [NLRA] without retaliation from Disney/ABC and any allies with which Disney/ABC conspires., Case 31-CA-23204, involving the Local Shows

KABC-TV, the local ABC-owned station in Los Angeles, has long produced and broadcast two programs before and after the Presentation (the "pre- and post-Show shows" or the "Local Shows"). NABET-represented employees have performed the production and broadcast work. These employees were covered by the expired agreement between ABC and the Union.

Aware of the absence of a collective-bargaining agreements and the Union's threatened and actual disruptions of ABC

programs, the president and general manager of KABC wrote to the president of NABET/CWA Local 57, which represents KABC employees, on January 19, proposing that KABC and the Union enter into a "Single Project Agreement" covering the Local Shows. This proposed Agreement included a no-strike clause and expedited arbitration of disputes concerning the production and broadcast of the Local Shows. While claiming to be willing to bargain with KABC about the subject, the Union rejected the station's proposal and refused to meet or failed to appear for scheduled meetings. The Union also claimed that KABC could not take work away from Union-represented employees and that any attempt to do so could result in an unfair labor practice strike against the station.

KABC then decided not to produce the Local Shows itself, for fear that the Union might disrupt the programs. Instead, KABC decided to enter into a contract with an independent producer to create the Local Shows. It is not clear whether KABC has sold or merely subcontracted the production rights. The station announced this decision to employees on February 20.

It does not appear that the Academy and KABC decisions not to use Union-represented employees to do production work for either the Presentation or the Local Shows will result in the layoff of any of those employees. It is not clear whether those decisions will result in any economic harm, such as, for example, the loss of premium pay.

ACTION

We conclude that the charges should be dismissed, absent withdrawal., Case 31-CA-23203, involving the Academy Awards Presentation

Initially, we concluded that the Academy, not ABC, retained the underlying right to produce the Presentation. Pursuant to Article 1 of the contract between the Academy and ABC, the Academy merely "grant[ed]" production rights to ABC for the term of the contract. Thus, ABC was merely a contractor for the Academy, not the owner of the production rights.

It is clear that the Academy decided to modify the contract that had given production rights to ABC and to produce the Presentation itself in order to avoid any possible disruptions caused by the labor dispute between the Union and ABC. This modification of the production and broadcast contract was lawful. An employer's decision to cease doing business with another employer because of the Section 7 activities of the employees of the other employer does not violate the Act.[(5)] The Board most recently reaffirmed this principle in Computer Associates International, 324 NLRB No. 43 (August 19, 1997). In that case, Computer, a software manufacturer, built a facility and entered into a subcontract with Cushman & Wakefield, a real estate management company, whereby Cushman agreed to provide building engineers for the Computer facility. A union represented the Cushman engineers. Five days after the union lost a representation election among Computer's employees, Computer terminated its contract with Cushman, resulting in the discharge of the Cushman engineers. Computer hired other engineers, none of whom belonged to a union. The ALJ found that Computer violated Section 8(a)(3) and (1) by causing the discharge of the union-represented engineers. The ALJ relied on Esmark, Inc.,[(6)] Dews Construction Corp.,[(7)] and Georgia-Pacific Corp.,[(8)] all cases in which an employer was held liable under Section 8(a)(3) for causing another employer to discriminate against its employees.

The ALJ concluded that these cases were applicable to situations in which the termination of a contract because of the Section 7 activities of the employees of one party to the contract led to the loss of employment of those employees. The Board reversed the ALJ on this point, finding instead that Computer's action was privileged by Malbaff, the language of Section 8(a)(3) and the legislative policies under Section 8(b), specifically, the policy "protecting the autonomy of employers in their selection of independent contractors with whom to do business." Slip op. at 2. The Board further noted that there was no finding that Computer, like the employers in the cases the ALJ had cited, had "sought to pressure, direct, instruct, order, or persuade" Cushman to terminate or replace the union-represented employees. Slip op. at 3.[(9)]

A similar conclusion is warranted here. The Academy asked ABC for a guarantee that the Union would not disrupt the Presentation. When ABC replied that it could not give such a guarantee, the Academy decided to modify its contract with ABC by terminating that portion of the contract by which it gave ABC the right to perform the production work necessary for the Presentation. However, the Academy did not direct ABC to treat its employees in any unlawful manner. Thus, under Malbaff and Computer Associates International, the Academy's decision to terminate the production contract with ABC and perform

the work itself did not violate Section 8(a)(3) and (1) even though it had the effect of depriving ABC's Union-represented employees of the work of producing the Presentation.[(10)]

Nor is there merit to the charge against ABC. As to the Section 8(a)(3) allegation, if it is lawful under Malbaff for the Academy to cease doing business with ABC, it cannot be unlawful for ABC to acquiesce in the Academy's decision.[(11)]

Further, we conclude that First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981), privileges ABC's action and therefore the Section 8(a)(5) charge should be dismissed Initially, we note that the work of producing the Presentation is not work covered by the jurisdiction clause of the expired contract between ABC and the Union. That clause, as quoted above, describes unit work as programs that are broadcast by ABC and produced either by ABC or by others for ABC "when the Company owns the basic underlying property rights in such program material, or portions of programs, or entire programs and subcontracts the production of the program to others." Here, the Academy, not ABC, owns the basic property rights in the Presentation and merely contracted with ABC for the production of the program. Thus, production of the Presentation is not work explicitly covered by the expired contract.[(12)]

We recognize that the ABC unit has in the past done the production work required for the presentation. However, once the Academy lawfully reclaimed the production work, ABC had lost the work. Under First National Maintenance, an employer has no obligation to bargain with a union about the decision to terminate a portion of its operations. Here, the Academy's decision to produce the Presentation itself resulted in a termination of work that ABC had performed. ABC had no control over the Academy's decision. Similarly, ABC had no obligation to bargain with the Union as to the Academy's decision and the resulting loss of the production work.[(13)]

Accordingly, the charge in Case 31-CA-23203 should be dismissed, absent withdrawal., Case 31-CA-23204, involving the Local Shows

This charge should similarly be dismissed, absent withdrawal.

Production of the Local Shows, unlike production of the Presentation, was clearly unit work covered by the expired collective-bargaining agreement because KABC owned the underlying property rights in the Local Shows. It is not clear whether ABC has sold or merely subcontracted the production rights to an independent producer. The cause and consequence of either type of transaction are the same: ABC has unilaterally removed unit work from the bargaining unit because of the unresolved contract negotiations between the Union and ABC.

However, we conclude that ABC's action is lawful because it is a temporary lockout and temporary replacement of unit employees that is permitted under Harter Equipment, 280 NLRB 597 (1986), petition for review denied, 829 F.2d 458 (3d Cir. 1987), where the Board held that, absent specific proof of antiunion motivation, "an employer does not violate Section 8(a)(3) and (1) by hiring temporary replacements in order to engage in business operations during an otherwise lawful lockout."

Initially, we conclude that the lockout was lawful. The parties have engaged in good faith bargaining over a new contract and there is no evidence that ABC has committed unfair labor practices. Therefore, ABC had the right to protect itself from the economic consequences of a strike or other disruptive Union action. As the Board stated in Harter, at 599:

There can be no more fundamental employer interest than the continuation of business operations. Exercising the right to lockout in a bargaining dispute does not necessitate foregoing the option to secure business earnings any more than exercising the right to strike requires employees to forego attempts to secure income by temporary alternative employment, strike benefits, or unemployment compensation (where permitted by state law).[(14)]

Here, ABC had a reasonable fear that the Union would engage in activities intended to disrupt the production of the Local Shows. KABC had proposed, and the Union had rejected, a Single Project Agreement covering the Local Shows and providing for no-strike and expedited grievance-arbitration provisions. While the Union had claimed that it was willing to bargain over a Single Project Agreement, it refused to meet promptly to bargain over the subject, cancelled meetings, and failed to appear at scheduled meetings. The Local Shows were the equivalent of "perishable commodities" resulting in significant economic loss

to ABC if the Local Shows could not be broadcast as scheduled,[(15)] the Union had previously struck and interfered with live programming,[(16)] the Union refused to agree to a Single Project Agreement with a no-strike clause,[(17)] and the Union refused to announce a specific strike date.[(18)] In these circumstances, ABC was privileged to lock out the unit employees.

ABC was also privileged to sell or subcontract the production rights for the Local Shows to another employer. It appears that ABC's arrangement with another producer is temporary, i.e., just for the 1998 Local Shows. We view the temporary transferring of work during a lawful lockout as being as lawful as the hiring of temporary replacements, because the temporary transfer has the same effect on the locked out employees.[(19)]

Moreover, we conclude that the temporary lockout of unit employees and transferring of the production work for the Local Shows is not "inherently destructive" of employees' Section 7 rights within the meaning of NLRB v. Great Dane Trailers, 388 U.S. 26, 33 (1967), where the U.S. Supreme Court held that some employer conduct is so inherently destructive of employee interests that it may be deemed proscribed by Section 8(a)(3) without proof of an underlying improper motive. The Court articulated the following guidelines for assessing employer motivation in the context of asserted Section 8(a)(3) violations:

First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct.[(20)]

A finding that an employer's conduct is inherently destructive does not conclude the inquiry. The Board's task is to "weigh[ ] the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and [to] balance[e] in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct."[(21)]

The Board's most recent statement and application of the "inherently destructive" theory can be found in International Paper Co., supra, where the Board held that the employer's implementation of a proposal to permanently subcontract unit work during a lawful lockout was inherently destructive of important employee rights. In reaching this conclusion, the Board set forth, at 1269-1270, four "guiding principles for determining whether inherently destructive conduct has occurred." The Board said that it must:

(1) determine the severity of the harm to the employees and the employees' Section 7 rights.[(22)]

(2) determine the "temporal impact" -- immediate or future -- of the employer's conduct.[(23)]

(3) determine whether the employer is hostile to the collective bargaining process or whether it intends only to support its bargaining position as to the subjects of bargaining.[(24)]

(4) determine whether the employer's conduct discourages collective bargaining by making it seem a futile exercise from the viewpoint of employees.[(25)]

Applying International Paper principles to this case, we conclude that ABC did not violate Section 8(a)(3) and (1) by locking out the unit employees and temporarily transferring the production work for the Local Shows. First, the harm to the unit employees is minor rather than severe; the employees lose the opportunity to work on the Local Shows but they do not otherwise lose their jobs, other work opportunities or significant benefits. Second, the "temporal impact" of the lockout is immediate and brief, covering only the production of the Local Shows. Third, there is no allegation or evidence that ABC is hostile to the collective-bargaining process; the lockout is intended only to support its bargaining position and to protect its "perishable" operations during negotiations. Finally, the lockout does not make collective-bargaining appear to be futile; ABC decided to subcontract the Local Shows after the Union rejected its offers to bargain over a Single Project Agreement. ABC is

apparently otherwise willing to continue bargaining over a new collective-bargaining agreement. Thus, the lockout is not inherently destructive, ABC has provided legitimate and substantial business justifications for the lockout, and there is no evidence of antiunion motive.

For all of these reasons, we conclude that ABC did not violate Section 8(a)(3) and (1) by locking out KABC unit employees and temporarily replacing them with production employees of another employer. It follows that ABC did not violate Section 8 (a)(5) because it was not obligated to bargain with the Union over its decision to have the production work performed by employees of another employer even though the loss of work resulting from this decision might otherwise be characterized a as change in the unit employees' terms and conditions of employment.[(26)]

In sum, the charges should be dismissed, absent withdrawal.

B.J.K.

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[1] There is no allegation that the Academy and ABC were joint employers as to the Presentation production and broadcast.

[2] All events occurred in 1998, unless otherwise noted.

[3] Thus it would appear that the modification to the ABC\Academy contract transferred the production of the Presentation to the Academy with ABC telecasting the Presentation with sufficient creative control to refuse to broadcast offensive or obscene material.

[4] No charge has been filed concerning the Academy's recognition of IATSE.

[5] See Plumbers Local 447 (Malbaff Landscape Construction Co.), 172 NLRB 128 (1968).

[6] 315 NLRB 763 (1994).

[7] 231 NLRB 182 (1977).

[8] 221 NLRB 982 (1975).

[9] See also Black Magic Resources, 312 NLRB 667, 668 (1993).

[10] There is no allegation that Malbaff is not applicable because the Academy and ABC are joint or single employers. See, e.g., Computer Associates International, supra, 324 NLRB No. 43, slip op. at 3, remanding case to resolve the General Counsel's contention that Computer and Cushman were joint employers, citing Whitewood Maintenance Co., 292 NLRB 1159, 1164-66 and fn. 24 (1989), enfd. sub nom. Texas World Service v. NLRB, 928 F.2d 1426 (5th Cir. 1991).

[11] Cf. IBEW, Local 501 (Atlas Construction Company), 216 NLRB 417 (1975), where, in addressing a Section 8(b)(4) complaint, the Board specifically rejected the ALJ's conclusion that an employer "did not try hard enough" to secure work from another employer for its union-represented employees.

[12] Therefore, we find no merit to the argument that, by taking the Presentation production work from ABC, the Academy was doing "struck work" and has become an "ally" of ABC. See, e.g., Local 32B-32J, SEIU (The Dalton Schools), 248 NLRB 1067, 1069 (1980), rejecting a similar contention.

[13] It does not appear that any unit employees will suffer economic harm as a result of the Academy's decision to produce the Presentation itself. Our conclusion that ABC was not obligated to bargain with the Union over the Academy's decision does not rest, however, on the absence of evidence of economic or other harm to unit employees.

[14] See also Laclede Gas Co., 187 NLRB 243 (1970); Betts Cadillac Olds, 96 NLRB 268 (1951).

[15] The Board has found similar lockouts to be lawful in a variety of settings. See, e.g., WGN of Colorado, 199 NLRB 1053 (1972), concerning broadcast of state high school basketball games. See also Bali Blinds Midwest,292 NLRB 243 (1988), where the employer had to meet seven-day delivery schedules promised to customers; Birkenwald Distributing Co., 282 NLRB 954 (1987), where the union voted in favor of a strike before the October-January busy period for the employer, a liquor distributor; Georgia-Pacific Corp., 281 NLRB 1 (1986), where an employer with integrated operations locked out employees to help it continue operations and fulfill obligations to customers.

[16] See, e.g., Redway Carriers, 301 NLRB 1113 (1991); Bali Blinds Midwest, supra.

[17] See, e.g., Georgia-Pacific Corp., supra. Compare Catalytic Industrial Maintenance, 301 NLRB 342 (1991) (lockout not lawful where employees made clear that they would continue to work, not strike).

[18] See, e.g., Birkenwald Distributing Co., supra.

[19] Cf. International Paper Co., 319 NRLB 1253, 1266 fn. 27 (1995), enf. denied on other grounds, 115 F.3d 1145 (D.C. Cir. 1997). See also Elliott River Tours, Inc., 246 NLRB 935 (1979) (faced with an imminent strike threat, an employer lawfully subcontracted commercial river trips to other outfitters for the following two years).

[20] Great Dane Trailers, 388 U.S. at 34.

[21] NLRB v. Erie Resistor Corp., 373 U.S. 221, 229 (1963).

[22] International Paper, supra at 1269.

[23] Ibid.

[24] Ibid.

[25] Id. at 1270.

[26] See also Land Air Delivery, 286 NLRB 1131, 1132 fn. 8 (1987) ("An employer is not under a duty to bargain over temporary subcontracting necessitated by a strike where such subcontracting does not transcend reasonable measures necessary to maintain operations in strike circumstances").